

STATE OF MICHIGAN
COURT OF APPEALS

NIDAL HADID, Individually and as Next Friend of
RICKY HADID, a minor,

UNPUBLISHED
March 5, 1999

Plaintiff-Appellant,

v

No. 205799
Oakland Circuit Court
LC No. 96-518315 NO

HARTMAN & TYNER, INC. d/b/a/ WOODWARD
NORTH APARTMENTS,

Defendant-Appellee.

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

On March 27, 1995, nine-year-old Ricky Hadid was visiting a relative, who occupied an apartment in defendant's building. During the course of his visit, Ricky went to the lobby of the building, where he encountered three other boys. Two of them held the glass door to the lobby shut while the other pushed Ricky into it. The glass of the door was not fitted with safety glazing material, or "safety glass" and, when it shattered, Ricky received a laceration to the palm of his right hand.

Plaintiff sued defendant, alleging that the failure to outfit the glass door with safety glazing material was a breach of defendant's duty to keep its premises in a reasonably safe condition for invitees¹ and that the glass door, being unreasonably dangerous to the public, constituted a nuisance. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with regard to the negligence claim on the grounds that defendant owed no duty to warn plaintiff of the door because its danger was open and obvious, and that the intervening acts of the other children actually caused Ricky's injury; and pursuant to both MCR 2.116(C)(8) and MCR 2.116(C)(10)² with regard to the nuisance claim because it merely restated plaintiff's negligence claim.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We review decisions on motions for summary disposition de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. All allegations and reasonable inferences which support the claim are taken as true. *Kuhn v Secretary of State*, 228 Mich App 319, 323; 579 NW2d 101 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is a genuine issue of material fact which would preclude judgment as a matter of law. It must be supported by documentary evidence and all reasonable inferences are drawn in favor of the nonmoving party. *Spiek, supra* at 337; *Bertrand v Alan Ford*, 449 Mich 606, 617-18; 537 NW2d 185 (1995).

On appeal, plaintiff first argues that the trial court improperly granted defendant's motion for summary disposition. Plaintiff contends that there are genuine issues of material fact remaining whether the glass door was an open and obvious danger and whether plaintiff could have avoided the danger even if he could have discovered it, and thus, whether defendant breached a duty of care owed to invitees by not replacing the door with "safety glass."³ However, even if we assume, without deciding, that defendant did breach a duty of care owed to invitees, plaintiff would still be required to prove that defendant's breach *caused* the injury in order to establish a prima facie case of negligence. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). In order to prove causation, plaintiff must show that defendant's action (or lack thereof) was both the cause in fact and the proximate cause of the injury. *Skinner v Square D Co*, 445 Mich 153, 162-63; 516 NW2d 475 (1994). The causation issue in this case is one of proximate cause.⁴

"[L]egal cause or 'proximate cause' normally involves examining the foreseeability of particular consequences." *Skinner, supra* at 163. When several factors contribute to an injury, each factor that was a substantial factor in bringing about an injury will be considered a proximate cause of such harm. *Hagerman v Gencorp Automotive*, 457 Mich 720, 737-38, 749; 579 NW2d 347 (1998). Although there may be more than one proximate cause of an injury, all of which are considered liable for such injury, where an intervening third party's actions work to cause injury following the negligence of the defendant, this intervening act may relieve the defendant of liability. *Poe v Detroit*, 179 Mich App 564, 576-77; 446 NW2d 523 (1989). A third party's intervening act cannot be considered a superseding cause, and thus relieve a defendant of liability, if any of the following are applicable:

- (a) [defendant] at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent. [*Rogers v Detroit*, 457 Mich 125, 143-44; 579 NW2d 840 (1998).]

Thus, an intervening cause is a superseding cause if it was not reasonably foreseeable. *Hickey v Zezulka*, 439 Mich 408, 437; 487 NW2d 106 (Brickley, J., Mallett and Levin, JJ., concurring), 447

(Riley, J., concurring in part and dissenting in part, Cavanagh, CJ, and Boyle and Griffin, JJ., concurring) (1992).

In this case, defendant claimed that the acts of the children who held the door closed and pushed Ricky into the glass were a superseding cause of his injury and that its own negligence, if any, was thus not a proximate cause. Generally, a premises owner does not have a duty to protect his invitees against the general incidence of crime in the community. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 401; 566 NW2d 199 (1997). The Supreme Court in *Mason* quoted Comment f to § 344 of 2 Restatement Torts, 2d, which stated, “Since the possessor is not an insurer of the visitor’s safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur.” *Mason, supra* at 399. In other words, as with all other types of intervening acts, criminal activity will relieve a defendant of negligence liability if it is not foreseeable. In this case, the intervening activity was the attack on Ricky Hadid by three other boys, in which two boys held the glass door closed while the third boy pushed Ricky into the glass, which broke upon impact, injuring Ricky. In our judgment, this conduct by the three boys was at the least intentional, and likely rose to the level of a criminal act. This was not a mere schoolboy tussle which inadvertently resulted in one boy falling into the glass. Since there is no indication that anyone, least of all defendant, had any prior notice that this attack upon Ricky was probable or even possible, we believe that it was not reasonably foreseeable that this event would take place. In addition, the attack upon Ricky cannot be seen as a normal consequence of defendant’s failure to replace the door with “safety glass.” See *Rogers, supra* at 144. There is no logical connection between such actions that would make the attack foreseeable, in our judgment. We believe that, under the circumstances of this case, no reasonable mind could find that defendant here caused Ricky Hadid’s injuries by not protecting him from the unusual events which led to his injury. The legal, or proximate cause of the injuries in this case was the boys’ intentionally injurious conduct, not the non-action of the apartment owners regarding the door. Thus, the trial court correctly granted summary disposition in favor of defendant on the negligence claim.⁵

Plaintiff also claims that defendant’s creation, ownership, or control of a nuisance in fact was improperly dismissed on the grounds that it merely restated plaintiff’s negligence claim. A given set of facts may give rise to more than one cause of action, such that it would be improper to summarily dismiss one claim merely because it relies upon the same set of facts as another claim. *Frieburger v Dep’t of Mental Health*, 161 Mich App 316, 319-20; 409 NW2d 821 (1987); see also *Li v Wong*, 162 Mich App 767, 772; 413 NW2d 493 (1987), vacated on other grounds 430 Mich 882 (1988). A claim for recovery of damages under a nuisance theory requires that a plaintiff either allege private nuisance, an unreasonable invasion of his right to the enjoyment and use of his property, or public nuisance, an unreasonable interference with a right common to the general public which harmed plaintiff in some manner different from that of the general public. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-06 n 11; 487 NW2d 715 (1992); *Cloverleaf Car v Phillips*, 213 Mich App 186, 190-93; 540 NW2d 297 (1995). Since plaintiff asserts no invasion of his rights in land, the claim is one for public nuisance. In *Sanford v Detroit*, 143 Mich App 194, 199-200; 371 NW2d 904 (1985), this Court quoted 4 Restatement Torts, 2d, § 821B, p 87, which stated:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public rights.”

The liability for nuisance stems from creation, ownership or control over such nuisance. *Cloverleaf, supra* at 191.

Accordingly, in order for plaintiff to have a valid claim for public nuisance under the circumstances in this case, he would have to show that (1) the door unreasonably interfered with a right of the general public; (2) that defendant exercised control, by ownership or otherwise, over the door; and (3) that plaintiff suffered an injury from the nuisance that was greater than that suffered by the general public. Since defendant did exercise control over the door at issue here, and plaintiff suffered an injury that was greater than that suffered by the general public, the only question remaining is whether the door, without “safety glass,” unreasonably interfered with a right of the general public. In this case, there was no statutory mandate that the glass in this door be replaced with “safety glass.” MCL 125.1381; MSA 5.2893(11). In addition, the door in question was located on private property and was not threatening to the general public. Even if glass breakage were determined to have been imminent, there was no threat to the general public’s safety, health, comfort or convenience, simply because the general public was not exposed to such danger, as it would be on a public sidewalk or highway or a hotel. See *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-67; 463 NW2d 450 (1990). Any danger from the glass was limited to the immediate area of the door, and would not have affected the general public, as with leaking chemicals. See *Cloverleaf, supra* at 191. Although the issue of whether a condition interferes with the public’s safety or convenience is generally a jury question, reasonable minds could not differ as to the conclusion that this door could not have substantially affected the general public’s safety and convenience, and thus the rights of the general public. Therefore, we affirm the dismissal of plaintiff’s nuisance claim under MCR 2.116(C)(10), because the facts, as developed, failed to establish the nuisance which was alleged by plaintiff. We determine that the trial court reached the right result even if not for the reason that we set forth here. *Howe v Detroit Free Press*, 219 Mich App 150, 158; 555 NW2d 738 (1996).

Affirmed.

/s/ Stephen J. Markman

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan

¹ The parties do not dispute that Ricky was an invitee to defendant, since he was a social guest of defendant's tenant. See *Petraszewski v Keeth (On Remand)*, 201 Mich App 535, 540-41; 506 NW2d 890 (1993).

² Neither the trial court's order nor the record specifically indicate the rule under which summary disposition was granted. We glean the basis from defendant's arguments in support of its motion.

³ MCL 125.1381; MSA 5.2893(11) states that the use of non-safety glazing material in a door constitutes an unreasonable hazard, but only mandates the use of safety glazing for installation or replacements occurring after the effective date of the act, July 1, 1973. Since defendant's building was built in 1966, and there was no evidence that the door had ever been replaced, this statute does not apply to defendant's door.

⁴ "But for" the lack of "safety glass" in the door, it appears that Ricky Hadid would not have been injured, at least in the particular manner in which he was injured in this case. Thus, the test for cause in fact is satisfied, and we next focus upon proximate cause. See *Skinner, supra* at 163.

⁵ Although questions of causation are often left to the jury, if there is no issue of material fact, the trial court may decide the issue itself. *Reeves, supra* at 480; see also *Brown v Michigan Bell Telephone, Inc*, 459 Mich 873; 585 NW2d 302 (1998). In light of our conclusions with respect to proximate cause, we find it unnecessary here to make any finding regarding the trial court's reliance, in part, upon the 'open and obvious' doctrine.